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In The

Supreme Court of the United States

October Term, 1975

No. 75-268

HYMAN RADZANOWER,

Petitioner,

vs.

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN, H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P. SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E. FLAHERTY, B.D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN, M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON, M.E. LIVINGSTON, JACK WRATHER, FIRST NATIONAL BANK OF BOSTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Certiorari Filed August 20, 1975, Certiorari Granted October 20, 1975

BRIEF FOR PETITIONER

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	7
Summary of Argument	10

Argument:

The broad public interest venue provisions of the Securities Act of 1933 (15 U.S.C. §77n(a)) and the Securities Exchange Act of 1934 (15 U.S.C. §78aa) prevail over and broaden the narrow venue provision of the National Bank Act (12 U.S.C. §94) when a national bank is sued for a securities act violation. 12

I. Fundamental Fairness. 12

II. Even if there were repugnancy, standards for partial implied repeal are fully met. 22

III. Judicial Economy. 30

Contents

Page

IV. Boston Bank through its conduct has waived any venue privilege. 34

Conclusion 35

TABLE OF CITATIONS

Cases Cited:

Boys Market Inc. v. Retail Workers Union, 398 U.S. 235 (1970) 18

Bruns, Nordeman & Company v. The American National Bank and Trust Company, 394 F.2d 300 (1968) 11, 12, 13, 14, 19

Buffum v. Chase Nat. Bank of City of New York, 192 F.2d 58 (7th Cir. 1951) 10, 34

Burns v. American National Bank and Trust Company, 479 F.2d 26 (8th Cir. 1973), 59 Iowa Law Review, 1030 (1974) 21, 22

Carlisle v. United States, 16 Wall. 147 (1878) 29

Carpenter v. Hall, 352 F. Supp. 806 (S.D. Texas 1972) 14, 19

Charlotte National Bank v. Morgan, 132 U.S. 141 (1889) 34

Contents

Page

Continental National Bank v. Folsom, 3 S.E. 269 (Ga. 1887) 34

Erlenbaugh v. United States, 409 U.S. 239 (1972) 18

Exchange National Bank of Chicago v. Rock, 197 S.2d 52 (Fla. App. 1967) 34, 35

First National Bank of Charlotte v. Morgan, 132 U.S. 141 (1889) 24

Fisher v. First National Bank, 338 F. Supp. 525 (S.D. Iowa 1972) 34

Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957) 28

General Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699 (S.D.N.Y. 1966) 26

In re Great Western Ranches Litigation, 369 F. Supp. 1406 (J.P.M.L. 1974) 31

In re Westec, 307 F. Supp. 559 (J.P.M.L. 1969) 32

Keppner v. United States, 195 U.S. 100 (1904) 27

Klein v. Bower, 421 F.2d 338 (2nd Cir. 1970) 13

Contents

Page

Lehigh Valley Trust Co. v. Central National Bank of Jacksonville, 409 F.2d 989 (5th Cir. 1969) 19

Levin v. Great Western Sugar Company, 274 F. Supp. 974 (D.N.J. 1967) 15, 17, 22

Lichtenfels v. North Carolina National Bank, 132 S.E. 2d 360 (N.C. 1963) 34

Mercantile National Bank at Dallas v. Langdeau, Receiver, 371 U.S. 555 (1963) 16, 25

Michigan National Bank v. Robertson, 372 U.S. 591 (1963) 25

Michigan National Bank v. Superior Court, 23 Cal. App. 3d 1, 99 Cal. Rptr. 823 (1972) 34

Okeechobee County v. Florida National Bank, 150 S. 124 (1933) 34

Posada v. National City Bank, 296 U.S. 497 (1936) 22

Prince v. Franklin Nat'l Bank, 310 N.Y. Supp. 2d 390 (N.Y. Sup. Ct. 1970) 35

Rodgers v. United States, 185 U.S. 83 (1902) 27

Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 852 (1973) 11, 14, 16, 17, 26

Contents

Page

S.E.C. v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) 14

Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., 189 S.E. 2d 266 (N.C. 1972) 34

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 23, 24

Stirling Homex v. Chemical National Bank et al., 74 Civ. 64-66 (DB) (Slip Opinion, J.P.M.L. Docket No. 133) 30, 31

Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942) 28

U.S. National Bank v. Hill, 434 F.2d 1019 (1970) 11, 14

Statutes Cited:

National Bank Act:

12 U.S.C. §11 16

12 U.S.C. §94 .....2, 9, 10, 12, 32

12 U.S.C. §99 31

The Securities Act of 1933, 15 U.S.C. §77n(a) 3, 12

Contents

Page

The Securities Exchange Act of 1934:

15 U.S.C. §78aa 4, 12

15 U.S.C. §27 7

The Banking Law of New York, Art. 3 §131, subd. 3 ... 5, 8, 9

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 22

28 U.S.C. §1332 22

28 U.S.C. §1337 22

28 U.S.C. §1348 22

28 U.S.C. §1391 3

28 U.S.C. §1404 33

28 U.S.C. §1407 ..... 30, 31, 33

United States Constitution Cited:

Fifth Amendment 29

Fourteenth Amendment 29

Contents

Page

Other Authorities Cited:

American Law Institute, Study of the Jurisdiction Between State and Federal Courts, p. 413 (1969) 28, 29

An Assault on the Venue Sanctuary of National Banks, 34 George Washington Law Review, 765 (1966) 29

92 C.J.S., Venue, Sections 64-70 21

H.R. 9323, Section 27 16

1 Moores, Federal Practice, Para. 0.144 (2d ed. 1974) 13

Venue Provisions of National Bank Act (12 U.S.C. §94), As Affected by Other Statutory Provisions Governing Venue, 10 A.L.R.Fed. 940 16

Waiver by National Bank of Statutory Right to be Sued in District Where Established or in Which It Is Located, 1 A.L.R. 3d 904 34

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OPINION BELOW

The opinion of the District Court is not reported. It is set forth in the Appendix at pp. 89a-91a. The judgment of the Court of Appeals is not reported; it is set forth in the Appendix at p. 94a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1975 (94a). The petition for a writ of certiorari was filed August 20, 1975 and granted on October 20, 1975. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do the more broad venue provisions of the Securities Exchange Act prevail over the restrictive venue provision of the National Bank Act or can they co-exist?

STATUTORY PROVISIONS INVOLVED

1. The venue provision of the National Bank Act (12 U.S.C. §94) provides:

> "Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within

> the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. The general venue provisions of 28 U.S.C. §1391 provide:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district wherein all defendants reside, except as otherwise provided by law.
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue provisions."

3. The Securities Act (15 U.S.C. §77n(a)) provides:

> "(a) The district courts of the United States courts, and the United States courts of any

territory, shall have jurisdiction of offenses and violations under this sub-chapter and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which defendant is an inhabitant or wherever the defendant may be found."

4. The Securities Exchange Act (15 U.S.C. §78aa) provides:

"The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or

rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant . . . . "

5. The Banking Law of New York (Art. 3 §131, subd. 3) provides that a non-New York Bank, as therein specified:

". . . may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the Surrogate's court of this

state, it shall file in the office of the clerk of the Surrogate's court of the county in which appointment is pending.

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"... provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration, and irrevocable, appointing the superintendent and his successors its true and lawful attorney; upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts

or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

STATEMENT OF THE CASE

First National Bank of Boston ("Boston Bank") was included as a party defendant in this class action upon the ground that it conducted banking business in New York and was involved with defendant Teleprompter Corp. and other defendants in diverse security transactions violative of the Securities Exchange Act of 1934, the New York Martin Act and common law (Complaint, 13a). Jurisdiction was based on §27 of the Exchange Act and pendent jurisdiction. Boston Bank moved to dismiss on the grounds of improper venue (59a). No challenge was presented to sufficiency of allegations upon which liability against each defendant was asserted and upon which recovery was sought. The District Court on October 21, 1974 dismissed for improper venue (90a).

The New York State Banking Law provides (Art. 3 §131, subd. 3) that a non-New York Bank may act as trustee, guardian, executor, administrator or in other fiduciary capacity under testamentary writing or trust instrument, or by court appointment, provided similar domestic corporations having the power to act under New York law in such fiduciary capacity are permitted to so act in the state where the foreign corporation is domiciled, and upon condition that such foreign bank files with the Clerk of the Surrogate's Court, or in the office of the Superintendent of Banks, a written instrument of indefinite duration, irrevocably appointing such clerk or superintendent or their successors, its true and lawful attorney upon whom all process in any action or proceeding "against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary, or the acts or defaults of such corporation in reference thereto" may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state.

Boston Bank on January 15, 1971 sent to the New York Banking Department:

> "A Power of Attorney executed by the First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded" (79a).

That Power of Attorney specified that:

> "This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York Banking Law. The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein" (77a).

The foregoing language did not limit in any manner the superintendent as designee for service of process (as Boston Bank could have provided by the statutory permissive language) to "any action or proceeding against such fiduciary (Boston Bank) affecting or relating to the estate, trust or fund held by such fiduciary" or its "acts or defaults" in reference thereto. Instead, the power was general and broad.

District Judge MacMahon, although noting that "the language of the designation is broad" (Opinion, 90a) held it did not operate "as a waiver of the venue provision" that a national bank may be sued only in the district in which it is established (12 U.S.C. §94), because the waiver thus narrowly construed did not embrace this lawsuit.

The venue provision of the National Bank Act was applied because Boston Bank is established in Boston, Massachusetts

and maintains no office or agent in New York and notwithstanding the undisputed fact that the activities and securities transactions in which Boston Bank participated and aided and abetted, as alleged in the complaint (14a), all took place in New York. It is noteworthy in this connection that Boston Bank failed to do what Chase Bank did in *Buffum v. Chase Nat. Bank of City of New York*, 192 F.2d 58, 61 (7th Cir. 1951). Chase had initially filed a designation authorizing its agent to accept service "in all suits in Illinois." When replaced by another, the replacement agent was authorized to accept service "in matters involving the limited purpose" for which Chase Bank "was qualified to do business in Illinois." Nonetheless, Judge MacMahon held that because Boston Bank "is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94," its broad designation "is not a waiver of this venue provision" (Opinion, 90a).

The Court of Appeals for the Second Circuit affirmed without opinion from the bench, undoubtedly because of the applicable decisions previously rendered by it and to which reference is hereinafter made.

SUMMARY OF ARGUMENT

The widespread and irreconcilable conflict among the circuits as to the conflicting venue provisions of the National Bank Act and the Securities Act and Securities Exchange Act should be resolved by declaring that the broad remedial provisions of the two Securities Acts prevail when a bank is sued for a securities violation.

The multiplicity of actions which result from suits against a bank in its distant district and against all other securities defendants in still another district, results in compounding judicial waste, conflicting adjudications, multiple trials (even with Judicial Panel) and often denies remedy to a victim of a securities fraud. Today, banks tend to be truly national in scope of their activities.

When the Bank Act provides that a national bank may only be sued where it is established, distant as that may be from the city where it operated openly as an alleged securities violator, and since the two Securities Acts provide that a defendant who violated the respective statutes may be sued wherever he be found or where his acts took place, a difficult problem arises in conflict. Petitioner suggests that in 1933 and 1934 Congress did not intend its remedial statutes to have such an inconsistent conflict favoring bankers in a climate then more concerned with the protection of the broader populace.

The Second Circuit in *Bruns, Nordeman & Company v. The American National Bank and Trust Company*, 394 F.2d 300 (1968) and the Ninth Circuit in *United States National Bank v. Hill*, 434 F.2d 1019 (1970) held that the National Bank Act venue prevails. The Third Circuit in *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (1973) later held that the Securities Acts were designed to prevail.

The commentators on the subject state that the Bank Act venue provisions are fundamentally unfair to and outside of equal protection and due process for the average plaintiff. In today's mobile society with banks so frequently crossing district

lines to compete and to conduct securities related activities, it becomes unjust for the victim damaged by banks in a New York securities transaction to travel to Massachusetts or Oregon perhaps (with attorney, records and witnesses) to air his suit.

ARGUMENT

The broad public interest venue provisions of the Securities Act of 1933 (15 U.S.C. §77n(a)) and the Securities Exchange Act of 1934 (15 U.S.C. §78aa) prevail over and broaden the narrow venue provision of the National Bank Act (12 U.S.C. §94) when a national bank is sued for a securities act violation.

I. Fundamental Fairness.

The instant issue primarily concerns venue under the 1934 Act. The 1933 Act venue provision is similar.

The 1934 Act, enacted as a remedial public interest measure, provides that every defendant in a securities related cause may be sued wherever the defendant be found or the operative deeds were performed. With the mores of the 1934 era, it seems clear that Congress was consumer concerned and the 1934 Act was clearly meant to supersede any earlier conflicting statute and to permit latitude of supervision over securities violations a subject of vast concern at that time.

The Second Circuit, *i.e., Bruns, Nordeman & Company v. The American National Bank and Trust Company, supra,* holds that the Bank Act prevails. The Second Circuit was not happy with this result. Judge Friendly stated:

> "We conclude with *regret* that the rulings upholding the claim of the 1864 Statute are right" (emphasis ours), 394 F.2d at 301.
>
> "[i]f we were writing on a clean slate we would not find it difficult to reconcile §94 of the National Bank Act with §22(a) of the Securities Act" (p. 303).

A later Second Circuit case. *Klein v. Bower,* 421 F.2d 338 (2nd Cir. 1970), simply followed *Bruns* without additional discussion of the problem. Judge Friendly, in *Bruns* found *"much practical appeal"* in the argument that securities law venue should control and he noted the *"heavy inconvenience for the plaintiff"* and the *burden on the federal courts* inherent in the holding. Although the securities law venue sections are special provisions, the court based its decision on Supreme Court cases holding that "where Congress has dealt with a particular venue problem — here actions against national banks — broader language in a general venue statute will not overcome this even though literally applicable." The court acknowledged that the venue provisions of the securities laws are special, but chose to ignore this argument as "too mechanical." It concentrated instead on legislative history of the securities laws.

It is impossible to ignore the fact that both sets of venue statutes here involved are special. One cannot discard the venue provisions of the securities laws on the theory that they are general. Venue statutes are special when they relate to a particular cause of action and to a particular class of persons. 1 Moore's, *Federal Practice,* Para. 0.144 (2d ed. 1974).

In *Bruns*, the Second Circuit went on to misinterpret intent of Congress in enacting the two securities laws. That court's assertion that Congress intended to subject national banks to the anti-fraud provisions, but not to special venue provisions provided to make the anti-fraud sections effective, is not convincing. No such conclusion is suggested by the regulation of national banks by the Comptroller of Currency. The comptroller is responsible for bank solvency and protection of depositors. He does not concern himself with protection of purchasers of securities. Any argument that regulation of banks by the comptroller will suffice to exempt banks from any provision of securities laws is scarcely tenable. In *S.E.C. v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), this court rejected a similar argument concerning state regulation of insurance companies. There is no reason to believe that national banks are not totally subject to securities laws except to the extent specifically exempted by express *haec verba* provisions of securities laws.

The Ninth Circuit held that the National Bank Act venue prevails, *United States National Bank v. Hill*, 434 F.2d 1019 (1970).

However, the Third Circuit, in a well reasoned detailed opinion, has recently held that the 1934 Act venue controlled, *Ronson Corp. v. Liquifin Aktiengesellschaft, supra*, despite what it considered the facial conflict between the 1864 and 1934 Acts.

Other District Courts held that the Securities Acts venue prevail. For instance, in *Carpenter v. Hall*, 352 F. Supp. 806, 808 (S.D. Texas 1972) the court noted:

> "[t]he precise question is still open in the Fifth Circuit, but the Court is of the opinion that when the question is raised 'in that Circuit' the Court of Appeals will adopt the reasoning in Levin, supra (274 F. Supp. 974 D.N.J. 1967) and will hold that the 1934 Act controls."

The first case to apply securities law venue to national banks was *Levin v. Great Western Sugar Company*, 274 F. Supp. 974, 978 (D. N.J. 1967). The court there found implied partial repeal of the bank statute venue by the securities law venue. The *Levin* court found affirmative evidence from an examination of the securities laws that national banks were to be subject to the new venue provisions:

> "But another reason compels my decision here. A quick examination of the 1933 and 1934 Securities Acts will reveal that on a number of occasions, the legislative draftsmen found fit to exempt national banks and their securities from the provisions of the Act . . . . It becomes clear that the legislative draftsmen knew about national banks when writing their securities acts, and knew how to exempt them from provisions of the acts when they chose to do so. It would be an usurpation of legislative prerogatives for this court to impute an exception from the 1934 Act, in view of the background just described."

Thus, in *Levin*, the court discerned congressional intent to subject all persons to the broad venue of the securities laws.

The legislative history of the statutes is illuminating. The purpose of the Bank Act has been expressed as an enactment for protection and convenience of national banks; to reduce interruption in their business from their records being sent to distant districts in obedience to process (prior to the modern miracle of Xerox or airplane). Anno: *Venue Provisions of National Bank Act* (12 U.S.C. §94), *as Affected by Other Statutory Provisions Governing Venue,* 10 A.L.R. Fed. 940, 943.

National banks are federal instrumentalities. The power of Congress over them is extensive. *Mercantile National Bank at Dallas v. Langdeau, Receiver,* 371 U.S. 555 (1963). The Bank Act was first enacted in 1863 and replaced a year later. Although amended a few times, the narrow venue provision has remained unchanged. Section 11 of the Bank Act provides banks with power to sue or be sued as natural persons. Although a bank is not limited as to where it may sue, it is only provided special privilege when being sued.

The Bank Act venue provision is not specifically known to have been considered by Congress when it enacted the Securities Acts in 1933 and 1934. The venue provision of the 1934 Exchange Act was originally authored in Section 27 of H.R. 9323. It cleared through Congress without significant change. It is petitioner's contention at bar, that Congress' silence evidences its intent, in 1934, to impose the venue provisions of the 1934 Act on all involved, without excepting banks. This added a further venue to bank-securities cases.

The court in *Ronson, supra,* was of similar opinion at 854:

> "We are guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities market and of affording proper disclosures to the investing public, as well as preventing fraud in securities trading. In recognition of the national rather than local nature of transaction involved, Congress enlarged the applicable venue and service of process requisites. An unduly narrow ruling on venue could not inhibitand reduce the effectiveness of the remedies provided by the Act."

Ronson further said at 854:

> "Indeed we note, as did the Court in *Levin v. Great Western Sugar Company, supra,* that when it drafted the Act, Congress was aware that certain portions might be construed as applicable to banks and proceeded to make specific provisions for them. The absence of such an exception in the venue section speaks forcefully for the proposition that the banks also were to be affected by its more expansive sweep.
>
> "Further evidence that in the securities field Congress intended the special jurisdiction and venue section of the Act to be complete and exclusive, may be found in the fact that power to hear cases arising under the statute was vested in

> the federal courts only as contrasted with the Banking Act which allowed litigation in state as well as the United States Courts."

Petitioner submits that the statutes must be construed together. The rule of *in pari materia* is a reflection of practical experience in interpretation of statutes. A legislative body generally uses a word with a consistent meaning in a given context. The rule is but a logical extension of the principle that individual sections of a single statute be construed together. There is necessarily the presumption that when Congress enacts a new statute, it acts fully aware of all previous statutes touching the same subject. *Erlenbaugh v. United States,* 409 U.S. 239 (1972). Therefore, it must be presumed that when Congress enacted the 1933 and then the 1934 Acts, it was fully aware of the 1864 National Bank Act and Congress did not intend to carve out of these remedial securities statutes that exception to the new broad public interest venue provisions but rather to enlarge the forum choice.

Statutory interpretation requires more than concentration upon isolated words; rather significant consideration must be given to the total corpus of pertinent law and to policies which may have inspired what could be ostensibly termed by an advocate, as even inconsistent provisions. *Boys Market, Inc. v. Retail Workers Union,* 398 U.S. 235 (1970). Congress must be afforded the presumption of consistent and thoughtful action rather than a suggestion of absence of clarity.

The depression policies and remedial climate which led to the two Securities Acts and other acts of that era are well

known. Congress clearly intended to provide a broad civil remedy for persons damaged by securities fraud and to make it less convenient for those in a position to commit fraud. It makes no difference if a bank is involved. Respondent cannot point to any material exception made by the Congress for a bank.

In *Carpenter v. Hall, supra,* the court cited the importance of the policy represented by the securities laws and noted the following statement by the Fifth Circuit in *Lehigh Valley Trust Co. v. Central National Bank of Jacksonville,* 409 F.2d 989, 993 (5th Cir. 1969):

> "That Congress made no express general exception for banks under the fraud provisions of either the Securities Act of 1933 or the Securities Exchange Act of 1934 indicates that Congress did not intend any such exemption."

The *Carpenter* court concluded from this that "since national banks are subject to the fraud provisions of these Acts, so also are they subject to the special venue provisions." The *Carpenter* court, *supra* at 811, was aware of the opinion of Judge Friendly in *Bruns:*

> "In reaching these conclusions, the court has carefully considered the perceptive and scholarly opinion of Judge Friendly . . . especially noting Judge Friendly's reasoning that in enacting the 1934 Act, Congress could hardly have anticipated that 'a national bank might join in a violation of Section 10(b).' The Court must respectfully differ

> with such conclusion. The decisions in this Circuit show decisively that the Congressional purpose of the Exchange Act was 'broad' and does not permit its restriction by a supposition that in 1934 Congress could not have anticipated that the bank might do those things that have been charged against the bank in this action."

Attempts to explain away these decisions cannot bear scrutiny.

It is not even necessary to find an implied repeal here.

Examination of the Supreme Court cases which have dealt with the bank venue issue discloses that none suggests that an implied repeal is involved here. The only discussion in those cases of implied repeal was concerned with a later venue provision on the same subject. The reason for this lack of discussion of implied repeal is apparent once the Bank Act is understood for it need not be found that the Bank Act creates securities immunity for national banks. It is a statute which allows national banks to be sued. Hence, when securities laws were later enacted, the venue provisions of the securities laws simply added additional forums where national banks may be sued.

Even if the Bank Act venue were mandatory, it does not mean that other venue statutes cannot apply also. It is not exclusive when another special venue statute also literally applies. Unlike substantive provisions, different venue statutes applicable in the same action need not be in conflict; they may

be supplementary. Special Bank Act venue has been held to exclude application of the general venue statute to national banks. But there is no conflict between the general venue statutue and the Bank Act because special governs general, and because general only applies "except as otherwise provided by law."

Here, on the other hand, Congress specifically acted in both cases. Respondent would have the courts partially strike down one of the venue provisions. It would be more appropriate for this Court to harmonize the Bank Act venue and the securities law venue by making each fully effective within their sphere.

Because of paucity of authority concerning conflicts between special venue statutes, analogy is appropriate. Federal question jurisdiction and diversity of citizenship jurisdiction are not in conflict because each is a separate grant. Neither diminishes the other. Each special venue statute is a special grant by Congress of a forum. If more than one venue applies, plaintiff has benefit of both. 92 C.J.S., *Venue,* Sections 64-70, 106. Unless these venue statutes are irreconcilable, the court is under a duty to harmonize. Here harmony is achieved by allowing each to fully operate. Plaintiff may be considered to have selected as his choice to invoke the venue of the securities laws, rather than that of the Bank Act. Nowhere is it written that Congress may not authorize venue against national banks in more than one place.

The analogy to jurisdiction is particularly compelling. In *Burns v. American National Bank and Trust Company,* 479 F.2d 26 (8th Cir. 1973), noted at 59 Iowa Law Review 1030

(1974), a national bank contended that the final sentence of 28 U.S.C. Section 1348 which states that for purposes of civil suit national banks are citizens of the states in which located, eliminated federal jurisdiction over national banks except under 28 U.S.C. Sections 1331 and 1332. The Eighth Circuit held that under 28 U.S.C. Section 1348, national banks were subject not only to diversity and to general federal question jurisdiction, but also to special federal question jurisdiction under 28 U.S.C. § 1337. Significantly, the court *en banc*, saw no reason to concern itself with standards for implied repeal, because nothing had been repealed. The court recognized that jurisdiction may be several and when two grants of jurisdiction are made, both apply.

II. Even if there were repugnancy, standards for partial implied repeal are fully met.

If there is repugnancy, securities law venue should control. It is last in time. *Posadas v. National City Bank*, 296 U.S. 497 (1936). Unless both venue statutes can exist together, repugnancy is present.

The *Levin* court stated at 978:

> "As was pointed out in *Talcott*, it is true that, as a general rule, implied repeals of previous legislation are not favored, and are to be found only when two statutory provisions are totally repugnant to each other. Agreed that this is the case, I still find that section 94 of Title XII and section 78aa of Title XV *are* totally repugnant to

> one another. It is clear that if section 94 prevails, the moving defendant banks can be sued only in California; if section 78aa prevails, suit is permissible here. Such a conflict constitutes total repugnancy."

With two special venue statutes, there can be no reconciliation unless both are held fully applicable. This Court, however, is not required to destroy the Bank Act venue if it finds inconsistency. It need only carve out a limited exception. In most cases, banks may retain their xenophobic venue except for the securities laws.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) for example, involving intersection of a broad federal regulatory scheme under securities laws and equally broad free competition commands of anti-trust laws, (both motivated by the strongest of public policies), this Court must have recognized that its holding would have extensive impact on many aspects of the intersection of those statutory schemes. This Court found the correct analysis to be reconciliation of the two schemes, with neither being "completely ousted." *Silver* did not present a case which enabled this Court to confine its holding to creation of a specific and narrow exception, as at bar. Therefore, this Court seemed constrained to determine whether the regulatory system of securities laws as a whole could be workable if the anti-trust laws were to apply. Finding immunization from anti-trust scrutiny not necessary to make the securities laws work, this Court found no implied repeal of anti-trust provisions as they related to securities exchanges.

But at bar, unless construction of the Bank Act permits utilization of the securities venue as well, we have a different situation. The system of bank regulation has never been thought to generate conflict with securities laws. Bank regulation, concerning largely protection of depositors, has left to the securities laws the protection of investors. Only in the narrow area of venue may a colorable conflict be perceived. Such a supposed conflict, unlike that in *Silver*, need not have repercussions for the banking and securities regulatory systems as a whole.

The Bank Act was enacted in 1864. There was no regulation of securities at that time. Seventy years later, Congress enacted securities law to regulate investment practices. A consideration of policies inherent in the two venue provisions conclusively demonstrate supremacy of securities law venue. The early cases indicate that the reason for the narrow limitation for banks was need to maintain books and records at its principal place of business, to preserve bank records from hazard of subpoena to remote litigation. *First National Bank of Charlotte v. Morgan*, 132 U.S. 141 (1889).

The securities laws on the other hand, were to provide broad pervasive regulation of the nation's financial resources. At a time of grave economic dislocation, Congress observed crying abuses and set out to correct them with strong remedial statutes. Included in the securities laws were provisions to expedite securities litigation. International service of process, broad jurisdiction and venue, and stringent liability provisions were included to insure that the new laws would be effective to correct the perceived abuses. An intent to pierce the thicket of federal

jurisdiction and venue rules is apparent on the face of the securities laws. Legislative intent resides not only within documents which purport to be "legislative history," but also in intent which plainly appears on the face of the statutes.

Comparison of the relative policies of the Acts here makes respondent's position of bank venue supremacy untenable. In this age of photostatic duplication and computer, Boston Bank's records are not threatened, respondent has not been so disingenuous as to suggest that stability of Boston Bank's business is at stake. Against the narrow construction of the Bank Act, so attenuated by the march of progress, must be weighed the continuing needs for regulation of securities. The policy of securities regulation is substantially furthered by laying venue broadly.

The center of gravity of this case lies within the concepts and regulatory norms of the securities laws. Boston Bank by its unlawful participation with others in securities frauds in the Southern District of New York has become accountable in that district. Justice requires that a narrow construction of the Bank Act not block proper litigation.

It is true as respondent states that in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) and *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), this Court held pursuant to 12 U.S.C. §94, that a bank may only be sued where it is established. However, in those cases this Court was not confronted with violation of the 1934 Act and its own independent venue clause. In fact, in *Michigan National Bank* at 595 (concurring opinion by Mr. Justice Black), it was said that it

is impossible to defend a statute "that would require a plaintiff to go to another state hundreds of miles from home to bring suit for a wrong done him in a transaction in his own state. . . ."

The Supreme Court has never, we believe, considered a case involving two special federal venue statutes. Some involved National Bank venue and the general venue statute; others, bank venue and a state statute. The case at bar is much different and novel; here two special federal venue statutes are involved. In *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 701 (S.D.N.Y. 1966) the court stated:

> "It does not appear that there are any cases involving a direct conflict between the venue provision of the National Bank Act and that of another special federal venue statute. Accordingly, this case is one of first impression." (See also Opinion, fn. 2).

In *Ronson Corp. v. Liquifin Aktiengesellschaft, supra,* the court observed:

> "The *Bruns* opinion referred to the cases of Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963), and Michigan National Bank v. Robertson, 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963), which dealt with conflicts between state venue acts and the National Banking Act. But in those discussions the Supreme Court was not considering the effect of the special venue section

> of the Securities Exchange Act. The differences between the two situations are obvious, and we think that the cases cited are not controlling in the present situation."

This Supreme Court is not bound by prior decision. In this determination the court may wish to consider similar cases from other circuits.

The cases cited by respondent on page 8 of their Brief in Opposition to Certiorari do not shed light. *Keppner v. United States,* 195 U.S. 100, 125 (1904) is inapposite. At bar, the specific area of the 1934 Exchange Act would control over the broad wording of the Bank Act. The Bank Act had attempted to cover all suits against a bank whether it be contract, tort or the like. The 1934 Act covers solely securities related actions. Thus venue for non-securities bank violations was not enlarged by the 1933 or 1934 Acts.

Rodgers v. United States, 185 U.S. 83, 88 (1902) contains language applicable to this case:

> "or unless the provisions of the general are manifestly inconsistent with those of the special."

At bar, the venue provisions of the 1934 Act are manifestly inconsistent with the Second Circuit's interpretation of congressional intent. That Honorable Court would read in added exception language which is nowhere present. Had Congress desired any "saving" language for the 1864 venue

limitation to be applicable to securities actions, it would have specifically added such.

Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561, 566 (1942) is vastly different in approach and concept from the case at bar. There the Patent Act of 1897 was a *later* restrictive measure limiting a *prior* venue provision. At bar, the Exchange Act is a subsequent broader venue statute.

As stated, *supra*, when Congress enacted the 1934 Act it is presumed to have been fully aware of the National Bank Act. Thus, the unrebutted presumption is that Congress intended to now provide a broader venue by enacting the subsequent act with no restriction or saving clause on the point.

Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222 (1957) considered whether there had been changes in the Judicial Code to negate *Stonite*. This Court held that the revision in 1948 did not affect viability of *Stonite*. *Stonite* dealt with a *subsequent* limiting venue statute. At bar we are dealing with *prior* limiting venue language broadened by a recognized remedial set of statutes in remedial days.

The cases cited by respondent are notable for lack of rationale and failure to discern that Supreme Court decisions on this question have never involved two special venue statutes or in some citations, no connection with securities law. The venue provision of the Bank Act has been severely criticized by commentators. For instance, the *American Law Institute, Study of the Jurisdiction Between State and Federal Courts*, (1969), states at p. 413:

> "There is no obvious reason why a national bank needed a restrictive venue rule or could not be treated as other corporations, and that a statute which would require a plaintiff to go to another state in order to bring an action for a wrong done to him in a transaction in his own state could not be defended."

The *Institute* continues at 413:

> "The statute ought to be repealed, and the Institute so proposes."

Also, *An Assault on the Venue Sanctuary of National Banks*, 34 George Washington Law Review 765 (1966).

There is logical reason for this. To allow a bank to enter a distant district, damaged a plaintiff and retreat to sanctuary of its own district when a party seeks relief, works injustice.

Indeed, the Bank Act may even violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

> "All general terms in statute should be limited in their application so as not to lead to oppression, if that is possible." *(Carlisle v. United States*, 16 Wall 147 (1878)).

Therefore, the venue provision of the 1934 Act must be construed to be in addition to or to limit those of the Bank Act

when applicable to securities violations. No longer as in 1864, was it necessary or advisable to protect and foster national banks who had by 1933 (more by 1975) truly become "national" in scope of affairs.

In this case, Radzanower who was damaged in New York by Boston Bank is required to travel to Boston, Massachusetts to obtain relief. This would impose an onerous burden upon him and be so oppressive that he may not be able to maintain two lawsuits, one in New York and one in Boston. No statute was intended to have such a result.

III. Judicial Economy.

Respondent's view of the Bank Act would thus run contra to consideration of judicial economy. When principles of Multidistrict Litigation, 28 U.S.C. §1407 become involved, the result can become further burdensome.

When a national bank is sued in a securities related cause, it must be separated from all other defendants and tried separately in its home district, no matter where that may be. When there are several national banks from different districts, as in a debenture registration, each must be sued separately in its separate district. Under 28 U.S.C. §1407, the suits may be consolidated in one district for pre-trial administration, but trials each must later take place in each bank's home district.

There is presently a matter pending in the Southern District of New York which provides clear example of the problem; *Stirling Homex v. Chemical National Bank, et al.*, 74 Civ. 64-66

(DB). In *Stirling*, the Judicial Panel on January 28, 1975 (Slip Opinion J.P.M.L. Docket No. 133) filed an opinion which disclosed that nine national banks were sued by Stirling in numerous districts in separate suits for violating federal securities laws and common law by falsely representing their intention to extend credit to Stirling. Similar complaints were used. The Panel in its footnote no. 1, p. 1 comments on this:

> "Since venue against four of the defendant banks was proper only in the banks' home districts, 12 U.S.C. §94, plaintiffs were forced to file these virtually identical actions in four different districts."

The Panel ordered pre-trial held in the Southern District of New York, pursuant to 28 U.S.C. §1407 and commented that the venue provision of 12 U.S.C. §99 does not affect this. However, trial of the four actions must be later held in four different districts.

This leads to waste and duplication of judicial effort. It could result in inconsistent adjudications. With judicial calendars so encumbered in recent years, four separate trials will become necessary solely because of this interpretation of the Bank Act v. 1934 Act venue provision.

Another example is *In re Great Western Ranches Litigation*, 369 F. Supp. 1406 (J.P.M.L. 1974). Great Western filed a petition for reorganization in the Northern District of California. Shortly thereafter, one original incorporator filed action in the same district charging violation of federal securities

laws. The trustee filed yet another action in the Northern District of California adding as a defendant, The First National Bank of Montana. The California court ordered the action against the bank severed and transferred to Montana pursuant to 12 U.S.C. §94. The Judicial Panel ordered the suit against the bank consolidated with the California claims for pre-trial purpose only, saying at footnote 1, p. 1406:

> "The operation of 12 U.S.C. §94 does not preclude transfer under 28 U.S.C. §1407 because the latter is not encumbered by venue considerations. The transfer under Section 1407 is only for coordinated or consolidated pre-trial proceedings. Trial of this action will still take place in the District of Montana."

Thus the trial of all the causes, excepting against the bank, will be held in California. The bank had the privilege of retreating to its home district. This again is waste of judicial economy, and could lead to inconsistent adjudications.

Lawmakers are presumed to intend to enact legislation which avoids unwieldly, inconsistent or cumbersome results. Another example of cumbersome results this venue problem does cause when interpreted to insulate national banks, is demonstrated by *In re Westec,* 307 F. Supp. 559 (J.P.M.L. 1969). Westec filed in the District Court for the Southern District of Texas a petition for appointment of a trustee under Chapter X of the Bankruptcy Act. He commenced an action in the Southern District of Texas on behalf of Westec, the creditors, and a class consisting in part of stockholders, naming

93 individual and corporate defendants. Twenty related actions were filed in the Southern Districts of Texas and New York, one New York defendant being Chase National Bank. All actions in New York except for the one against Chase and another were transferred to Texas, pursuant to §1404. The action against Chase was severed and remained in New York. The Judicial Panel then transferred the New York-Chase action to Texas for pre-trial (fn. 8, p. 562). The trial against Chase would have still been held in New York, if not for settlement.

The concept of the Judicial Panel was to increase judicial efficiency. Yet, the venue of the Bank Act, as it was construed below at bar, hinders that objective. All that §1407 accomplishes is to consolidate the bank's action with the others for pre-trial alone.

The securities violation problem of the the Bank Act is most prominent in the case at bar. Respondents' view would require that at least one action be filed in New York, where most activities took place and where most defendants are located, plus one in Boston, where a complete trial would be required involving the New York named defendants as non-party violators (perhaps not even liable to subpoena and similar trial needs). This does no more than add burden to plaintiff and the judicial machinery with witnesses, records and attorneys traveling to two separate locations, with separate judges and dockets.

IV. Boston Bank through its conduct has waived any venue privilege.

Wholly apart from proper interpretation of the Bank Act and venue provisions of the securities laws, is the issue here of waiver. The complaint alleges numerous transactions by Boston Bank in the Southern District of New York and its broad power of designation of agent for broad service. These acts and transactions constituted a waiver of any venue privilege. Venue is a personal privilege which may be waived by conduct. See *Waiver by National Bank of Statutory Right to be Sued in District Where Established or in Which It is Located,* 1 A.L.R. 3d 904. Also, *First Charlotte National Bank v. Morgan,* 132 U.S. 141, 145 (1889). This annotation contains a fairly complete listing of cases dealing with waiver of venue by national banks.

The earliest case to consider this question, *Continental National Bank v. Folsom,* 3 S.E. 269 (Ga. 1887), held that where a national bank entered the jurisdiction, filed a lawsuit, and posted bond, it had waived its right to be sued elsewhere on that bond. This rule was followed in *Okeechobee County v. Florida National Bank,* 150 S. 124 (1933); *Lichtenfels v. North Carolina National Bank,* 132 S.E. 2d 360 (N.C. 1963); *Michigan National Bank v. Superior Court,* 23 Cal. App. 3d 1, 99 Cal. Rptr. 823 (1972); *Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Company,* 189 S.E. 2d 266 (N.C. 1972); *Fisher v. First National Bank,* 338 F. Supp. 525 (S.D. Iowa 1972).

See also *Buffum v. Chase National Bank, supra.*

Although two decisions hold against petitioner's position on waiver *(Exchange National Bank of Chicago v. Rock,* 197 S.2d

52 (Fla. App. 1967), and *Prince v. Franklin National Bank,* 310 N.Y. Supp. 2d 390 (N.Y. Supreme Ct. 1970)) we believe them wrongly decided. Each contains little more than a sentence on this subject. Since Boston Bank went well beyond the limited authority it had obtained in New York and conducted activities in this district not unique to banks, it waived any special privilege even under its own interpretation of the applicable statutes. Its activities here were remote from those the 1864 Congress envisioned national banks participating in.

CONCLUSION

For the reasons detailed, it is respectfully submitted that the judgments of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York, should be reversed with directions that the motion to dismiss on the ground of improper venue be denied.

Respectfully submitted,

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